SUPREME COURT

JUL 24 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1909

NORMAN ALFIN,
Petitioner,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Respondent.

BRIEF

In Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INDEX

	Page
Issue presented	1
Statement of the case	2
Reasons for denying the writ	3
Conclusion	6

Cases Cited

Atkinson v. Sinclair Refining, Inc., 370 U.S. 238, 82 S. Ct. 1318	3
Egan v. City of Aurora, 365 U.S. 514, 81 S. Ct. 684 (1961)	3
John Wiley & Sons v. Livingston, 376 U.S. 543, 84 S.Ct. 909 (1964)	3, 5
Lewis v. Benedict Coal Co., 361 U.S. 459, 80 S.Ct. 489 (1960)	5
Local Union No. 998, Int'l Union, United Automobile Workers v. The B. & T. Metals Co., 315 F.2d 432 (6th Cir. 1963)	4
Prima Paint v. Flood & Conklin, 388 U.S. 395 (1967)	5
Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402 (2nd Cir. 1959)	5
Safeway Stores v. American Bakery & Confectionery Workers, Local 111, 390 F.2d 79 (5th Cir. 1968)	4
United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850 (1963)	3
United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343 (1960)	3
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358 (1960)	3
United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347 (1960)	3
Weinrott v. Carp, 32 N.Y.2d 190, 344 N.Y.S. 2d 848	5

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ISSUE PRESENTED

Was the Court of Appeals correct in holding that attacks on the validity of a collective bargaining agreement must be decided by the court and not the arbitrator?

STATEMENT OF THE CASE

Petitioner's Statement of the Case is not sufficient.

There is a critical omission of the fact that Petitioner, in the district court, did not suggest any fraud in the contract's inception. That issue, as the Court of Appeals noted, was raised by Petitioner for the first time before the arbitrator.

The petition does not mention that the funds which the Union sought to collect consisted in substantial part of wages due Petitioner's employees for work actually performed on the strength of Petitioner's promise to pay. The arbitrator in holding the contract invalid did not limit his holding to avoiding any future performance under the contract, but actually excused Petitioner from paying his own employees for work already performed.

The opinion of the Court of Appeals adequately states the facts (App. 20a).

REASONS FOR DENYING THE WRIT

The Writ should be denied.

I

There Is No Conflict of Federal Law to Be Resolved.

There is no conflict between circuits, *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850 (1963). The decision of the Court of Appeals does not conflict with any decision of this Court. *Egan v. City of Aurora*, 365 U.S. 514, 81 St. Ct. 684 (1961).

The Court of Appeals has applied the definitive decisions of this Court.

All matters going to the existence of a collective bargaining agreement, and, hence, to the duty to arbitrate, are for the Court. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909 (1964). Whether petitioner "was bound to arbitrate, as well as what issues . . . [he] must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson v. Sinclair Refining, Inc.*, 370 U.S. 238, 241, 82 S.Ct. 1318, 1320; *John Wiley & Sons v. Livingston, supra.*

The Fifth Circuit has been carefully faithful to the proscriptions of the Trilogy.[1] Numerous decisions of that circuit have reaffirmed the finality of collectively bargained arbitration

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[1] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358 (1960).

awards upon the merits.[2] That court has only recognized this as one of the exceedingly rare cases in which such an award must be set aside.

Here, the arbitrator did not merely ignore the only issue which was raised by the pleadings[3] and which was referred to him for determination. He undertook to decide the basic issue peculiarly within the court's area of responsibility. And in holding that the collective bargaining agreement was a nullity, he literally cut the ground from beneath himself. For without a contract, there could have been no arbitration; and without determining the existence of the contract, the District Court could not have ordered arbitration in the first place.[4]

Whatever glosses may have been placed upon *Wiley*, the task that it described for the court—that of determining "substantive arbitrability"—remains undiminished.

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[2] *E.g., Safeway Stores v. American Bakery & Confectionery Workers, Local 111*, 390 F.2d 79 (5th Cir. 1968).

[3] Petitioner's answer in the district court, it bears repeating, did not suggest any alleged invalidity of the collective bargaining agreement.

No challenge of any kind was filed to the default judgment, on the identical collective bargaining agreement, against the company.

[4] *Local Union No. 998, Int'l Union, United Automobile Workers v. The B. & T. Metals Co.*, 315 F. 2d 432 (6th Cir. 1963).

III

The Decision Below Is Correct and Is Not to Be Judged by Commercial Law Standards

We are not dealing here with an ordinary commercial contract, but with a collective bargaining agreement.[5] This Court made clear in *Wiley, supra* at 550: ". . . a collective bargaining agreement is not an ordinary contract. . . . Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . [citations omitted] and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship." See also *Lewis v. Benedict Coal Co.*, 361 U.S. 459, 80 S.Ct. 489 (1960).

Undoubtedly, on the remand ordered in this case by the Fifth Circuit, it will become obvious again that petitioner has no real defense of fraud.

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[5] Appellant would make the impermissible analogy to authorities dealing with arbitration under ordinary commercial contracts. See, *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2nd Cir. 1959), *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967), and *Weinrott v. Carp*, 32 N.Y.2d 190, 344 N.Y.S. 2d 848. They all concerned commercial contracts, and do not deal with the unique importance and characteristics of arbitration in federal labor law.

IV

CONCLUSION

In sum, there was no yielding here to the arbitrator of any jurisdiction to decide the threshold question of the contract's existence. No such transfer of authority was possible. The arbitrator's jurisdiction under the district court's referral order was confined to determining liability under the terms and provisions of a valid collective bargaining contract. Petitioner's belated attack upon the underlying contract, voiced for the first time in the arbitration proceeding, could not enlarge the jurisdiction of the arbitrator or endow him with the authority which he did not and could not possess under governing federal law.

The issue of fraud in the inducement was withheld by Petitioner from the district court. He led that court to believe he was relying upon the contract and its procedures. He then sought, before the arbitrator, to raise that defense both to avoid the very contract he had asserted, and even to avoid compliance with the contract to the extent it had been performed by his employees.

Petitioner's claim is without merit and is singularly inappropriate for review by this Supreme Court.

None of the applicable federal cases which have come in the Trilogy's wake (and Petitioner cites none) hold that issues as to the creation of a contract are for the arbitrator.

There is general agreement, of course, that issues properly triable before an arbitrator will likely receive expeditious treatment. But that particular virtue of arbitration, comes with little grace from Petitioner. After considerable evasion and delay on his part, he was only brought to book on the wage claims of his employees by the use of Alabama's long arm statute in a suit at law. The Union had until then tried in vain to get him before an arbitrator on the claim for wages earned and due.

Whatever the state of the law elsewhere, federal law is clear: The court decides initially that a contractual duty to arbitrate exists under a collective bargaining contract.

That has been done here.

The writ should be denied.

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Certificate of Service

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